IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR.

J U D G M E N T

Kanhaiya Lal Sharma Vs. Smt. Narendra Kanwar & anr.

S.B. CIVIL REGULAR FIRST APPEAL No.163/2007 against the judgment & decree dated dated 2.3.2007 passed by the ADJ No.4, Jaipur city, Jaipur in Civil Suit No.203/2006.

Date of Judgment :: April 02,2007

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. G.K. Garg for the plaintiff-appellant.
Mr. B.L. Agrawal for the defendant-respondents.

REPORTABLE

BY THE COURT:

1. This appeal U/s.96 of CPC is directed against the judgment and decree dated 2.3.2007 passed by the learned ADJ No.4, Jaipur City, Jaipur dismissing the suit filed by the plaintiff Kanhaiya Lal Sharma as barred by principles of res-judicata.

2. The litigative history of this long drawn battle, in brief is like this. The plaintiff Kanhaiya Lal in the plaint of the preset suit filed for declaration and permanent injunction stated that he was working as cook with late Rao Bhagwat Singh Ji and also did Seva Pooja in his temple and being happy with his service, the said Rao

Bhatwat Singh gave a gift of suit property comprising of two rooms on the ground floor and one at first floor constructed thereon and open land near Ghodon ki Dhani in Jaipur. The said Rao Bhagwat Singh expired on 25.11.1967 and he left behind three wives Smt. Ghanshyam Kanwar, Smt. Sajjan Kanwar and Smt. Subh Deveshwari who filed a partition suit which was decreed upon compromise on 31.5.1974. The portion which fell in the share of Smt. Sajjan Kanwar was sold through her power of attorney holder Shri Megh Singh Bhati to Smt. Ishwari Devi who in turn sold the property to defendant No.2 Smt. Madhu Chaudhary on 29.3.1986. Thereafter Smt. Madhu Chaudhary filed a suit for eviction against the plaintiff Kanhaiya Lal Sharma relating to suit property on the ground of default, denial of title and reasonable and bona fide necessity. On 13.11.1997, the present plaintiff appellant Kanhaiya Lal filed a written statement in the said suit and denied the relationship of landlord and tenant and alleged that in the year 1938-39 these premises were given to him by way of gift by late Rao Bhagwat Singh. The said plea of gift was sought to be raised by seeking an amendment in the written statement by way of application under Order 6 Rule 17 CPC filed on 23.2.1999 which was allowed and a amended written statement was filed on 17.4.1998. Accordingly, besides other issues the learned trial court framed issue No.12-A in the said suit No.106/98 which was as under:-

> “12A.Whether Rao Bhagwat Singh Ji gave the disputed property in the year 1938-39 to the defendant (Kanhaiya Lal) by way of gift deed and he is in possession of the said suit property as owner since then?”

3. While deciding the said issue the learned trial court found vide its judgment dated 31.3.2004 that the defendant had failed to prove the said gift deed as the same was not even signed by the donor nor the same bore any signatures of witnesses and was merely a photo copy of a document which was marked as Ex.A-4. Therefore, the said document was not found proved by the learned trial court and on the contrary it was found that the said suit premises were taken on rent by the defendant Kanhaiya Lal at the rate of Rs.8/- per month vide Ex.9 on 28.4.1958. Accordingly, the decree of eviction was passed deciding all the issues against the defendant. The appeal against that decree also failed vide judgment dated 16.12.2004 passed by the learned ADJ No.5, Jaipur City, Jaipur. The second appeal carried to this Court also failed on 2.1.2006 (S.B. Civil Second Appeal No.73/2005 – Kanhaiya Lal Vs. Smt. Madhu Chaudhary, decided by Hon'ble the Chief Justice Shri S.N. Jha). In the said appeal, the substantial question framed for consideration by the Court included the question relating to issue No.12-ka which is also reproduced hereunder:-

> "Whether the finding with regard to issue no.12-ka rendered by the courts below are vitiated on account of misreading of the document itself and whether the patta or gift issued by Thikana required registration?"

4. The Court found that in view of the concurrent findings of fact holding the appellant as tenant in the suit premises which cannot be set aside in second appeal, the claim of gift having been rejected by both the courts below it is not open to the appellant to question the right and title of Smt. Sajjan Kanwar or the validity of compromise decree. By virtue of the compromise in the partition suit after the death of Rao Bhagwat Singh, Smt. Sajjan Kanwar stepped into his shoes and became landlord of the suit premises, and by virtue of purchase initially Smt. Ishwari Devi and subsequently respondent Smt. Madhu Chaudhary became the owner and the appellant became their tenant. Thus, the second appeal was dismissed by this Court.

5. Still the appellant Kanhaiya Lal was not satisfied and he carried the matter further to Hon'ble the Supreme Court of India where also the appellant failed after taking time on at least 2-3 occasions to impress upon the validity of gift made in his favour, to save his title and possession over the suit premises. This would be

evident from the copy of orders dated 13.2.2006 passed by Hon'ble the Supreme Court during the pendency of the Special Leave to Appeal (Civil) No.2611/2006 which says “counsel for the petitioner prays for some more time to verify whether at the time when the gift deed is alleged to have been made in favour of the petitioner some time in the year 1938-39 the law applicable in the State of Jaipur required registration. Put up after two weeks. Status quo to continue in the meantime.” Ultimately, the said SLP came to be dismissed by Hon'ble the Supreme Court of India on 1.9.2006.

6. When the matter thus attained finality, the idea of reinitiating the whole battle again appears to have dawned upon the plaintiff and he filed the present suit No.1095/2006 on 12.10.2006 before the learned trial court claiming the right of declaration of his ownership on the basis of the same alleged gift deed in his favour and cancellation of sale deed dated 2.6.1975 and 19.3.1086 in favour of Smt. Ishwari Devi and Smt. Madhu Chaudhary. To give a different colour to the suit he added defendant No.1 Smt. Narendra Kanwar, daughter of Smt. Sajjan Kanwar and Smt. Madhu Chaudhary only as defendants. The said suit was contested and upon the preliminary objection of res-judicata, issue No.4 was framed and decided against the plaintiff by the impugned judgment dated 2.3.2007, against which the present appeal has bee filed by the

appellant plaintiff Kanhaiya Lal Sharma.

7. Mr. G.K. Garg, learned counsel appearing for the appellant was at pains to emphasise with the help of numerous decisions, which are listed below, that the learned trial court while deciding rent eviction matter could not have decided the question of title and, therefore, any finding against the present appellant in such rent eviction matter can be of no consequence and the same deserves to be ignored as far as the present suit was concerned.

1. **Richpal Singh & ors. Vs. Dalip** [(1987 4 SCC 410];

2. **Pandurang Mahadeo Kavade & ors. Vs. Annaji Balwant Bokil & ors** [1971 (3) SCC 530];

3. **Sayyed Ali & ors. Vs. A.P. Wakf Board, Hyderabad & ors.** [(1998) 2 SCC 642];

4. **Sushil Kumar Mehta Vs. Govind Ram Bohra (dead) through his Lrs.** [(1990) 1 SCC 193];

5. **A.V.G.P. Chettiar & Sons & ors.Vs. T. Palanisamy Gounder** [(2002) 5 SCC 337];

6. **Mahila Bajrangi (dead) through Lrs. & ors. Vs. Badribai w/o. Jagannath & anr.** [(2003) 2 SCC 464];

7. **Mohan Vs. Anandi (Smt.) & ors.** [(1996) 7 SCC 734];

8. **Madhvi Amma Bhawani Amma & ors. Vs. Kunjikutty Pillai Meenakshi Pillai & ors.**
[(2000) 6 SCC 301];

9. **Sajjadanashin Sayed MD B.E. EDR (D) by Lrs. Vs. Musa Dadabhai Ummer & ors.**
[(2000) 3 SCC 350];

10. **Bhavsingh (Dead) by Lrs. Vs. Keshar Singh & ors.**
[(2003) 8 SCC 263];

11. **Ridh Narayan Vs. Smt. Laxmi Devi & Sita Ram**

[S.B. Civil Second Appeal No.594/2005] and Ridh Narayan Vs. Smt. Laxmi Devi & Radhey Shyam [S.B. Civil Second Appeal No.595/2005-decided on 1.12.2005];

12. **Laxman Prasad Vs. Kanwar Veersen & anr.**

[S.B. Civil Writ Petition No.4145/200– decided on 29.7.2005]

13. **Chief Justice of Andhra Pradesh & anr. Vs. L.V.A. Dikshitulu & ors.**
[AIR 1979 SC 193];

14. **Smt. Krishna Rustagi Vs. Subhash Chand Rustagi**

[S.B. Civil Misc. Appeal No.933/2003 – decided on 6.9.2006];

15. **The Province of Bombay Vs. The Municipal Corporation of Ahmedabad**
[AIR 1954 Bombay 1];

16. **Smt. Gangabai w/o. Rambilas Gilda Vs. Smt. Chhabubai w/o. Pukhrajji Gandhi**
[(1982) 1 SCC 4];

17.**Rameshwar Dayal Vs. Banda (Dead) through his Lrs and anr.**
[(1993) 1 SCC 531]

8. The gist of the cases above and relied upon heavily by the learned counsel for the appellant is like this. A decree passed by a court without jurisdiction over the subject matter or on other grounds which goes to the root of its exercise of jurisdiction, lacks inherent jurisdiction. It is a **coram non judice**. A decree passed by such a court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the authority of the court to pass a decree which cannot be cured by consent or waiver of the party. If the court has jurisdiction but there is defect in its exercise which does not go to the root of its authority, such a defect like pecuniary or territorial could be waived by the party. They could be corrected by way of appropriate plea at its inception or in appellate or revisional forums, provided law permits. But where certain statutory rights in welfare legislation are created, the doctrine of waiver also does not apply to a case of decree where the court inherently lacks jurisdiction. The doctrine of res judicata under Section 11, CPC is founded public policy. A question of jurisdiction of a court or of a procedure

or a pure question of law unrelated to the right of the parties founded purely on question of fact in the previous suit, is not res judicata in the subsequent suit. A question relating to jurisdiction of a court or interpretation of provisions of a statute cannot be deemed to have been finally determined by an erroneous decision of a court. Therefore, the doctrine of res judicata does not apply to a case of decree of nullity.

A matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter “directly and substantially” in issue but it does not mean that if the matter is one in respect of which no relief is sought, it is not directly or substantially in issue. It may or may not be. It is possible that it was “directly and substantially” in issue and it may also be possible that it was not collaterally or incidentally in issue, depending upon the facts of the case. The question arises as to what is the next test for deciding into which category a case falls? One test is that if the issue was “necessary” to be decided for adjudicating on the principal issue and was decided, it would have to be treated as “directly and substantially” in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res-judicata in a latter case (Mulla, p.104). One has to examine the plaint, the written statement, the issues and the judgment to find

out if the matter was directly and substantially in issue.

9. On the other hand, Mr. B.L. Agrawal, learned counsel for the respondents emphasized that it is a sheer abuse of process on the part of the present appellant and having lost battle right upto Hon'ble the Supreme Court in eviction case, he is at pains to put the clock back at square one which simply is not permitted in view of binding decisions of courts below as well as this Court and Hon'ble the Supreme Court of India where his main defence was on the strength of the gift deed in question which he claimed as his foundation to deny the title of the defendants and protect his possession over the suit property. He submitted that issue No.12-A was framed at the instance of the present appellant only and that having been decided against the plaintiff and such a finding having become final, the appellant cannot be left free to raise the same issue all over again and the learned trial court has, therefore, rightly dismissed the suit as barred by principles of res-judicata by the impugned judgment. The judgments relied upon by Mr. Agrawal are the following:-

1. **Isher Singh Vs. Sarwan Singh & ors.**
   [AIR 1965 SC 948];
2. **Puthen Veettil Nolliyodan**

Devoki Amma & ors. Vs. Puthen Veettil Nolliyodan Kunhi Raman Nair & ors.
[AIR 1980 Kerala 230];

3. **Kumarmoni Sa Vs. Himachal Sahu & ors.**
[AIR 1981 Orissa 177];

4. **Church of South India Trust Association Vs. Telugu Church Council**
[AIR 1996 SC 987];

5. **Onkar Lal Vs. Rewa Puri**
[AIR 2000 Raj. 228];

6. **Smt. Pushpa Sharma Vs. Gopal Lal Rawat**
[1986 RLW 618];

7. **Babulal & ors. Vs. Kanhaiyalal**
[AIR 1975 Raj. 136];

8. **Rajendra Kumar Vs. Kalyan (D) by Lrs.**
[2000-01 DNJ (SC) (Suppl.) 162];

9. **Firm Ishardass Devi Chand & anr. Vs. R.B. Parkash Chand & anr.**
[AIR 1969 SC 938];

10. **Gorie Gouri Naidu (Minor) & anr. Vs. Thandrothu Bodemma & ors.**
[(1997) 2 SCC 552];

11. **Sulochana Amma Vs. Narayanan Nair**
[(1994) 2 SCC 14];

12. **E. Ethirajan (Dead) by Lrs. Vs. Lakshmi & ors.**
[(2003) 10 SCC 578];

13. **Pawan Kumar Gupta Vs. Rochiram Nagdeo**
[(1999) 4 SCC 243];

14. **Commissioner of Endowments & ors. Vs. Vittal Rao & ors.**
[(2005) 4 SCC 120]

The sum and substance of the judgments relied by Mr. Agrawal is that the question whether a matter was directly and substantially in issue in the former suit has to be decided (a) on the pleadings in the former suit, (b) the issues struck therein, and (c) the decision in the suit. Further, it depends upon whether a decision on such an issue will materially affect the decision of the suit. Where in the former suit the heirship of the respondents to the deceased (a) was in terms raised by the pleadings, (b) an issue was framed in regard to it by the trial Judge, (c)evidence was led by the parties on that point directed towards this issue, (d) a finding was recorded on it by the appellate Court, and (e) on the proper construction of the pleadings, it would have been necessary to decide the issue in order to properly and completely decide all the points arising in the case to grant relief to the plaintiffs.

10. The Hon'ble Supreme Court in **Gorie Gouri Naidu (Minor) & anr. Vs. Thandrothu Bodemma & anr.** [(1997) 2 SCC 552] held that inter parties judgment rendered by the court of competent jurisdiction, even if erroneous, would bind the parties. When in an earlier suit, deed of gift of immovable property was declared to be invalid, that

decision would be binding on the donees and it would not be open for them to claim any title in respect of the same property on the ground that in view of the family settlement, the opposite party would be estopped from challenging validity of the gift deed.

11. The Hon'ble Supreme Court in **Sulochana Amma Vs. Narayanan Nair** [(1994) 2 SCC 14], held as under:-

> "Section 11 is to be read in combination and harmony with Explanation VIII. The result that would flow is that an order or an issue which had arisen directly and substantially between the parties or their privies and decided finally by a competent court or tribunal, though of limited or special jurisdiction, which includes pecuniary jurisdiction, will operate as res judicata in a subsequent suit or proceedings, notwithstanding the fact that such court of limited or special jurisdiction was not a competent court to try the subsequent suit. The issue must directly and substantially arise in a later suit between the same parties or their privies. The technical aspect, for instance, pecuniary or subject- wise competence of the earlier forum to adjudicate the subject-matter or to grant reliefs sought in the subsequent litigation, should be immaterial when the general doctrine of res judicata is to be invoked. Explanation VIII, inserted by the Amending Act of 1976, was intended to serve this purpose and to clarify this position. By operation of the non-obstante clause finality is attached to a decree of civil court of limited pecuniary jurisdiction also to put an end to the vexatious litigation and to accord conclusiveness to the

> issue tried by a competent court, when the same issue is directly and substantially in issue in a later suit between the same parties or their privies by operation of Section 11. The parties are precluded from raising once over the same issue for trial."

12. Having considered the rival submissions and carefully perused the cited case laws at bar, this Court is of the opinion that the present appeal filed by the plaintiff appellant Kanhaiya Lal Sharma has no force and the same deserves to be dismissed.

13. Though the finding of the learned trial courts which achieved the finality upto Hon'ble the Supreme Court against the plaintiff Kanhaiya Lal was by the court when deciding a rent eviction case, nonetheless it is beyond pale of doubt that issue relating to gift deed in question was directly and substantially involved before the learned trial court in those proceedings as the present appellant denied the title of landlord on the strength of this very so called gift deed and this very same document which is sought to be made the basis of re-initiating the litigation, was considered, evaluated and sought to be proved before the learned trial court in those proceedings. One after the other, unfortunately for the appellant, the courts right upto the Hon'ble the Supreme Court found against the appellant plaintiff that nothing of substance was proved in his favour and,

therefore, the defence in eviction case based upon such document was found to be frivolous and a decree of eviction was passed and upheld right upto the Hon'ble the Supreme Court. In the face of this, allowing now the same plaintiff to claim ownership by way of declaration on the basis of same document would be nothing less than the abuse of process of the Court. The findings of the courts in those proceedings cannot be held to be nullity in any manner. The principles of res-judicata as rightly laid down in umpteen number of cases is the public policy to curtail frivolous and repetitive litigation on the same issue between the same parties and mere changing the name of one or two defendant or moulding of prayer in different terms, is more with an effort to mislead rather than the genuine different relief sought on the basis of pleadings and evidence. The principle enshrined in Section 11 of CPC is to prohibit such frivolous and vexatious litigation and, therefore, such fresh streams of suits by making a hair splitting exercise, as was sought to be canvassed by the plaintiff appellant in the present case, cannot be permitted. On the other hand, principles of res-judicata including the principles of constructive res-judicata enable the Court to see the substance and to bar such frivolous and repetitive suits, if the issues and findings in the earlier suits appear to the court to be covering the same field. In the present case, in the opinion of this Court, it is clearly so and,

therefore, the learned trial court cannot be faulted in having rejected the suit on the principles of res-judicata.

14. Consequently, this appeal is found to be devoid of merit and the same is accordingly dismissed, with no order as to costs.

(**Dr.VINEET KOTHARI),J.**

VS/